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IN THE

Supreme Court of the United States

October Term, 1970
No. 695

COUNTY OF SANTA BARBARA, *et al.*,

Petitioners,

vs.

ROBERT J. MALLEY, *et al.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY TO OPPOSITIONS.

The idea, expressed in the Government's opposition (p. 5) that once the leases have been let (the blow-out and its consequences notwithstanding)[1] the matter

[1]The January, 1969 blowout in the Santa Barbara Channel affected some 1800 square miles of water, 40 miles of shoreline and necessitated the closing of the Santa Barbara Harbor. [5 R. 1322-1324.] An affidavit by the Vice-President of defendant Union Oil Company, the company from whose Platform A the well which blew out was drilled, was to the effect that even as of the very early stages of this litigation, cleanup and restoration costs were in excess of $4,000,000. [6 R. 1634.] Numerous damage suits have been filed and it is reasonable to conclude that many millions of dollars of damage accrued, to say nothing of the unknown question as to permanent damage to the ecology. It is now known that the geological formation in which that well was drilled was actually damaged by the blowout. (President's Message to Congress, June 11, 1970.) Earlier, upon viewing the effect of the oil spillage in the Channel, President Nixon said, "The Santa Barbara incident has frankly touched the conscience

(This footnote is continued on the next page)

is then "principally" between the lessees and the Secretary of the Interior, cannot be accepted. At least if by this the Government means, as it apparently does, that the public will not be heard and must stand idly by while its natural resources and its coastal environment (described as to this area by the Council on Environmental Quality as "the most used natural recreational resources") are being desecrated. The Outer Continental Shelf Lands Act is a *conservation* statute. (43 U.S.C. 1332[b], 1334 [a] [1]; Pet. Appx. 21, 23-24.) And regardless of what may have been the correct construction of the Act and the Regulations vis-a-vis the right of the public, and shoreline communities, property owners and businesses, to hearings prior to the National Environmental Policy Act of 1969 (42 U.S.C. 4331, *et seq.*) it is now manifest that that latter Act calls for pulic hearings and that the Department of the Interior as well as the President have concurrently interpreted that Act to mean just that.[3]

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of the American people." [5 R. 1338.] Former defendant and Secretary of the Interior Hickel said of the tragedy: "[T]he blowout and resulting oil spillage that occurred during the ten-day period beginning January 28 was simply more than any sensible American should be expected to take." [5 R. 1344.] While former Secretary Udall described the event as "a conservation Bay of Pigs." [5 R. 1365.] In its First Annual Report, the Council on Environmental Quality referred (p. 11) to the Santa Barbara Channel as a "classic case" of exploiting resources with methods that create problems greater than the value of the resources themselves.

[3]In the Appendix hereto we set out in brief petitioners' argument as to how the Department of Interior regulations require public hearings. We contend that the court below erred in not accepting the argument. However, because the Department now has construed, as do petitioners, the National Environmental Policy Act to require hearings, it may not be necessary to determine whether the court below was in error as to the regulations. Petitioners seek a hearing. If they get it through the Environmental Policy Act, an additional right to the same thing by way of the regulations will be of no moment.

Thus, in his Executive Order 11514 (35 Fed. Reg. 4247) implementing the Environmental Policy Act, the President ordered (Sec. 2[b]) that in matters with environmental impact, every agency must institute procedures which "shall include, whenever appropriate, provision for public hearings and shall provide the public with relevant information on alternative courses of action." And on September 17, 1970, subsequent to the filing of the petition herein, the Department of the Interior added a new part (Part 516 DM 1-3) to its Departmental Manual "to fulfill the policy and directives of the National Environmental Policy Act . . . and of Executive Order No. 11514" (Part 516.1.1) and provided for hearings (Part 516.1.3D[6] and 516.2.10A).

Moreover, even before it added Part 516 to its Departmental Manual, the Department had recognized that the Environmental Policy Act called for hearings. In its Press Release of October 16, 1970, concerning leasing off the coast of Louisiana, the Department said:

> "*In keeping with the provisions of the National Environment Policy Act of 1969*, Secretary Hickel called for hearings on the question of oil and gas leasing in this area of the Gulf of Mexico. Beginning on July 14, 1969, three days of hearings were held in New Orleans, providing conservation groups, State and local agencies, and other interested parties the opportunity to voice their opinion on the proposed sale. (emphasis added.)
>
> "During the three days 110 persons presented oral testimony . . . The testimony represented a broad spectrum of interests including elected officials, consumer groups. offshore operators, oil companies, fishermen, sportsmen and environmentalists."

And in its October 22, 1970 Press Release on the same subject, the Department pointed out that "[n]otice of the hearing was published both in the Federal Register and widely in the press nationwide."

Accordingly, as authoritatively construed, the National Environmental Policy Act requires hearings. (This is but Congress' way of accepting the Secretary at his word when he said in the Department of the Interior's Press Release of August 22, 1969, "we are determined to conduct public business in a public manner" [4 R. 1086].) The fact that the President's Executive Order uses the words "whenever appropriate", does not detract from petitioners' point. The Department of the Interior has never contended that hearings as to Santa Barbara Channel would not be "appropriate". Its contention has been that they are not required. As we said, whatever may have been the situation before the addition of Part 516 to the Departmental Manual and under only the regulations, the Department has now unequivocally made clear that, in its view, the Environmental Policy Act requires hearings. We agree. The Department must follow its own rules. (*Service v. Dulles*, 354 U.S. 363.)[3]

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[3]In *Malley*, the regulations in effect when the suit was filed, clearly called for a hearing by the Corps of Engineers which petitioners seek. (33 C.F.R. 120[g]; 1969.) On January 3, 1970, the Corps of Engineers (as did the Department of the Interior in *Sierra Club v. Hickel*, pending here on petition for writ of certiorari to the same Court of Appeals, No. 939, O.T. 1970, when the right to a hearing was taken seriously by the plaintiffs there [Pet. 30]), purported to change the regulations (30 Fed. Reg. 80) so as to deny the right to a hearing.

While, concededly, *Sierra Club* and the instant cases are different, they are in some respects quite similar. At least the approach of the court below to the matter of public hearings and the status of the public's stake in environmental matters is the same in both cases. Thus, in this case the court below said that

Among the various oppositions to the grant of certiorari herein, it is suggested in Humble's (p. 4) that the local governments were granted a hearing before the leasing in the Channel took place. The Government opposition makes no such claim. It is not true that a hearing was afforded. It is true that letters were written and conferences held, but writing letters to, or having a conference with, a public official is not a hearing. (*Office of Communication of United Church of Christ v. F.C.C.*, 359 F. 2d 994, 1004 [CA DC 1966].) And a "hearing" without access to the information upon which the "opposition" is basing its claim, is likewise not a hearing within the proper meaning of the term. (*Morgan v. United States*, 304 U.S. 1, 18.) Moreover, as recognized by the Council on Environmental Quality, matters environmental or ecological were not even considered when the leasing was being offered. (First Annual Report, p. 11.)

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since hearings by the Corps of Engineers "would not purport to adjudicate the property rights of any of the plaintiffs" because (improperly, we say) limited to matters of "navigation and national security" (Pet. Appx. 6) and a hearing before the Department of the Interior would not prevent "another blowout or other physical damage of an irreparable nature" (Pet. Appx. 14), plaintiffs cannot prevail and accordingly it was proper to deny the injunctions sought and to allow new development in the Channel without there having been a hearing.

In *Sierra Club* (Appx. 16 to Petition for Writ of Certiorari), the court below denied standing to sue to that conservation society on the ground that it was not "aggrieved" or "adversely affected". The environmental interest was held to be insufficient. While in the instant case the court below did not question plaintiffs' standing, it is clear that its view of the right in both cases is the same: if the plaintiffs cannot show a property or some comparable loss, they have no interest to be protected. (This is not to suggest that the petitioners in the instant case—City and County of Santa Barbara which own property on the sea coast, beach property homeowners, boatowners, business men—do not have property interests which have been damaged and which may be damaged in the future by oil disasters in the Channel.)

Both former Secretaries of the Interior (Udall, when the leases were allowed, and Hickel, when the blowout occurred) have publicly acknowledged that to have allowed the leases was a serious mistake. That mistake took place without the responsible officials having had the benefit of the insight to be gained by hearings. The same mistake as to the future should not be allowed.

The impression is given by the opposition (*e.g.* Humble Br. 4; Govt. Br. 3; Union Br. 4) that the recommendations of the DuBridge Panel that there be continued drilling to relieve the pressures extant after the blowout, settled the matter so far as the result of the channel is concerned. This is not so. The DuBridge Panel report was limited to one area, the Dos Cuadros Field, and really to only one zone therein, the Repetto Zone. The instant cases involve the whole channel and its *future* development. There are large areas of the channel (much greater than that with which the DuBridge Panel was concerned) as to which the report of that panel had nothing to do, but which are involved in the instant petitions and as to large parts of which the Council on Environmental Quality has urged not be exploited.

The impression is left by the Humble opposition (pp. 5-6) (*e.g.*, "No suit has been brought against State leaseholders.") that development in the State leases, within the three-mile limit, is going forward. This is likewise not the case. Subsequent to the blowout California imposed a moratorium on drilling; it is still in effect.

What the Government means (Br. 7) by physical interference with navigation is not clear. But the Government and Humble (Br. 13) are mistaken if they intend to convey the idea that there is no danger to

navigation from the platforms and the attendant huge tankers they entail. Petitioners have sought a hearing to present these matters, but have been unable to get one.

Humble "mentions" (p. 9) the fact that certain legislation has been introduced in Congress regarding purchase back by the United States of some of the leases in the Channel. This, because of its "impression" (*ibid.*) that the instant cases are attempts to invalidate judicially the Santa Barbara Channel leases and it then argues that the advisability of the termination of leases is for resolution by Congress.

Whatever legislation is pending before Congress is pending before Congress. This petition is not concerned with that. Nor does this petition seek to invalidate, judicially, the leases in the Santa Barbara Channel. Petitioners are concerned with the right to a hearing and by this petition they seek to obtain one. Their right thereto is a judicial matter and for this Court.

The hearing petitioners seek is not directed at the daily work in the Channel. (Humble Br. 10.) It is concerned with major matters therein. Even now, there is pending before the Secretary of the Interior an application for the Santa Ynez Unit, an application for the unitization of 18 leases in the Channel affecting over 86,000 acres of territory, envisaging 4 or 5 massive platforms from each of which 60 wells can be drilled, and seeking to operate in great depths of water (700-1500 feet and later, perhaps, 2000 feet;—depths in which drilling has never been accomplished before. (The deepest has been 380 feet. The Santa Barbara blow-out was in waters 200 feet.) This is precisely the kind of a matter as to which the Secretary should hear all parties out—with all the data available for critical

scrutiny—so that when he does make his decision, it will be an informed one and not made merely on the presentation of the oil companies whose interest is, understandably, profits, not conservation or environment. Indeed, the whole future of oil operations in the Channel is a never ending question for the Secretary. The effects of the January 1969 blowout are not so easily forgotten. The proposed Santa Ynez Unit makes of the Santa Barbara Channel and of Santa Barbarans, a Guinea Pig. If this is to be done, a matter not before the Court in this petition, the "Guinea Pig" should be allowed to be heard.

Nor is the hearing petitioners seek one in which millions will be heard. (Humble Br. 10.) This kind of argument was properly and effectively dealt with in Mr. Chief Justice (then Judge) Burger's opinion in *Office of Communication of United Church of Christ, supra,* 359 F. 2d 994, 1006 (CA DC 1966). It is the kind of a hearing recognized, albeit belatedly, by the Secretary as proper and fasible in his now regulations which call for hearings when tracts are being offered for lease. (43 C.F.R. 3381.4; Pet. Appx. 35.) It is the kind of a hearing directed by the President in his Executive Order on the National Environmental Policy Act of 1969 [Ex. O. 11514; 35 Fed. Reg. 4247; § 2[b]], *supra,* and by the Department of the Interior in its Departmental Manual. (Part 516.1.3D(6) and 2.10A *supra.*)

But Humble is right—and candid in its efforts that it be not so—that a public hearing would consider matters ecological (as well as environmental, conservational, aquatic, aesthetic, recreational, etc. *Cf.* Sec. 101 of the National Environmental Policy Act, 42 U.S.C. 4331; 43 C.F.R. 3381.4; 33 C.F.R. 209.120[d]). It

is not to be forgotten that the Outer Continental Shelf Lands Act *is* a conservation statute and that "the character as high seas above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected." (43 U.S.C. 1332[b].)[4] The old way of doing things wherein the environment and the ecology were ignored, is gone.[5]

Petitioners, of course, dispute the suggestion of respondents (*e.g.*, Union Br. 10) approving, not surprisingly, the view of the Court of Appeals that there is little likelihood of success by plaintiffs on the merits. Quite the contrary, especially now that the President has ordered his executive subordinates to hold hearings (a directive that those in the case at bar thus far seem determined to disregard), it is very likely that plaintiffs will prevail. Moreover, the issues raised by plaintiffs are "serious, substantial, difficult and doubtful, (so) as to make them a fair ground for litigation and thus for more deliberate investigation." (*Hamilton Watch Co. v. Benrus Watch Co.*, 206 F. 2d 738, 740 [CA 2, 1953].) This is the standard which the court below

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[4]The National Environmental Policy Act of 1969, 42 U.S.C. 4331 *et seq.*, is, of course, a late—hopefully not too late—effort by Congress to see to it that the environment is no longer forgotten in our decision making processes. The effect of this Act on the current cases is presently pending before the District Court. It is one of the reasons we have urged this Court to defer disposition of this petition. We treat of this more in our Motion to Defer.

[5]As the President said in his February 10, 1970 message on the environment (116 Cong. Rec. H 743; 1970 U.S.C. & A.N. 112): "Like those in the last century who tilled a plot of land to exhaustion and then moved on to another, we in this century have too casually and too long abused our natural environment. The time has come when we can wait no longer to repair the damage already done, and to establish new criteria to guide us in the future . . . The tasks that need doing . . . call for fundamentally new philosophies of land, air and water use . . . for greater citizen involvement."

should have applied in considering whether the trial court abused its discretion in denying the preliminary injunctions.

Conclusion.

Only part of these cases is present before the Court in this petition. All parts should be here. Hence, our suggestion, made now by formal motion, that this Court defer disposition until the District Court acts. But, in any event, the petition should be granted.

Respectfully submitted,

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